

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DANIEL FORCE and DIANA FORCE,

Plaintiffs,

v.

WRIGHT MEDICAL TECHNOLOGY,  
INC., and WRIGHT MEDICAL GROUP,  
INC.,

Defendants.

CASE NO. 3:12-cv-05687-RBL

ORDER GRANTING LEAVE TO  
AMEND

[Dkt. #13]

THIS MATTER is before the Court on Defendants' Motion to Dismiss Plaintiffs' Complaint Under Rule 12(b)(6) [Dkt. #13]. Plaintiffs' seven claims arise out of Wright Medical's design and manufacture of a hip prosthesis that failed several years after its implantation in Daniel Force's left side. (Pl.'s Resp., Dkt. # 15 at 1.) Wright Medical argues that Plaintiffs' Complaint should be dismissed because it is barred by the "unavoidably unsafe" product defense. Also, they argue that Plaintiffs fail to allege facts sufficient to support their claims. (Def.'s Mot. to Dis., Dkt. #13 at 2.)

Plaintiffs acknowledge that their nonconformance, negligence, and misrepresentation claims should be dismissed. (Pl.'s Resp., Dkt. #15 at 2.) Accordingly, these claims (Claims 3, 5, and 8 in Plaintiffs' Complaint) are DISMISSED with prejudice.

1 Plaintiffs argue that the facts alleged in support of their remaining claims are sufficient.  
2 Alternatively, they seek leave to amend their Complaint in order to cure any deficiencies.  
3 Plaintiffs' Motion for Leave to Amend is GRANTED, and Defendants' Motion to Dismiss is  
4 DENIED without prejudice.

## 5 I. DISCUSSION

### 6 A. Legal Standard

7 Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal  
8 theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v.*  
9 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff's complaint must allege  
10 facts to state a claim for relief that is plausible on its face. *See Aschcroft v. Iqbal*, 129 S. Ct.  
11 1937, 1949 (2009). A claim has "facial plausibility" when the party seeking relief "pleads  
12 factual content that allows the court to draw the reasonable inference that the defendant is liable  
13 for the misconduct alleged." *Id.* "[A] plaintiff's obligation to provide the 'grounds' of his  
14 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of  
15 the elements of a cause of action will not do. Factual allegations must be enough to raise a right  
16 to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)  
17 (citations and footnotes omitted). This requires a plaintiff to plead "more than an unadorned,  
18 the-defendant-unlawfully-harmed-me-accusation." *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*).

19 Dismissal is not the remedy for factually deficient complaints that may become sufficient  
20 after further amendment. The court has discretion to grant or deny leave to amend, and "should  
21 freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). "[T]he court may permit  
22 supplementation even though the original pleading is defective in stating a claim or defense."  
23 Fed. R. Civ. P. 15(d). In determining whether to grant leave, courts consider five factors: "bad  
24 faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the

1 plaintiff has previously amended the complaint.” *United States v. Corinthian Colleges*, 655 F.3d  
2 984, 995 (9th Cir. 2011). Among these factors, prejudice to the opposing party carries the  
3 greatest weight. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

4 **B. Plaintiffs’ Factual Allegations are not Sufficient**

5 Wright Medical correctly argues that Plaintiffs’ Complaint lacks sufficient factual  
6 allegations. Instead of pointing out any of their specific factual allegations, Plaintiffs simply  
7 state that their factual allegations rise to the level of plausibility. Like their Complaint,  
8 Plaintiffs’ Response is full of conclusory statements and does little to advance their cause.  
9 Because factual allegations are absent from the Complaint, Plaintiffs’ attempts to compare their  
10 case with others is unpersuasive.

11 Simply alleging that Defendants manufacture the product that failed in Mr. Force’s left  
12 side does not create a plausible claim. Liability under the Washington Product Liability Act  
13 depends on defects in the product’s design, manufacture, or warnings. The following list  
14 provides examples of Plaintiffs’ insufficient, conclusory allegations: “[the hip devices] were  
15 defective in their manufacture and construction,” “they deviated from product specifications  
16 and/or applicable federal requirements for these medical devices, posing a serious risk of injury,”  
17 “[the products] were in a dangerous and defective condition and posed a threat to any user or  
18 consumer,” and “Defendants failed to provide adequate and timely warnings or instructions....”  
19 (Complaint, Dkt. #2 at 23, 26.) These are exactly the type of formulaic recitations that *Twombly*  
20 and *Iqbal* reject.

21 The Complaint fails to allege any specifics about the alleged defects, how the product  
22 deviated from requirements, what about it was dangerous, or what about the warnings were  
23 inadequate. *Twombly* and *Iqbal* do not set a high bar, but they do require more than Plaintiffs  
24 provide. Therefore, Plaintiffs fail to properly plead their product liability claims.

